IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7884 OF 2005

Smt.Shakuntala Raju Shetty .. Petitioner.

Versus

Tikam P. Washwani .. Respondent.

Shri.G.S.Godbole a/w.Shri.Yatin R.Shah for the petitioner.

Shri.P.S.Dani for the respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 9th March, 2007.

P.C.

1. This petition under Article 227 of the Constitution of India challenges an inter-locutory order during the course of hearing of an application being Int. Notice No.3843 of 2002 in R.A.E. Suit No. 202/339 of 2002.

2. By the order under challenge passed on a

Revision Application bearing No.34 of 2005, the Appellate Bench of Court of Small Causes at Mumbai dismissed the revision application preferred by the present petitioner-original plaintiff in the suit. The Appellate Bench held that the order passed by the Trial Court dated 4th December, 2004 in Int. Notice No.5340 of 2004 is not liable for being interfered with in the revisional jurisdiction of the Court of Small Causes at Mumbai.

3. In my view, enough confusion has been created uptill now and repeatedly this Court had been called upon to clarify earlier orders.

4. It is, therefore, necessary to place the fact situation in proper perspective.

5. The present petitioner has filed the above suit on the basis that she is the owner and the landlady of a building known as "Geetanjali"

situate at Lady Jamshedji Road, Mahim, Mumbai - 400 016. Flat No.11 (suit premises) in the said building, according to her, was let out to one R.P.Wadhwani. The tenancy was monthly tenancy and the amount was Rs.566/- per month. Shri.R.P.Wadhwani has expired and the respondent-original defendant to the suit claims that he is the heir and legal representative of the late R.P.Wadhwani.

6. The case set up in the plaint by the present petitioner is on the basis that the respondent-defendant is not occupying the suit premises since 1st November, 1997 and the same are locked, he does not require the suit premises for his residence as he has obtained suitable alternate accommodation for himself and for his family, that he is causing nuisance and annoyance to the neighbours and is endangering the stability of the building and the present petitioner-original plaintiff requires the

premises reasonably and bonafide for herself and for the members of her family.

7. Both sides do not dispute that the prayers in the suit are for possession of the suit premises and that landlord’s request is that a decree as prayed in the plaint be passed for possession and eviction of the respondent-defendant from the suit premises.

8. It is also not in dispute that the petitioner-original plaintiff applied for an amendment to the plaint, which application was allowed and the matter was carried by the Respondent-Defendant to this Court by filing Writ Petition bearing No.6800 of 2003. At the hearing of this Writ Petition, a statement was made on behalf of the landlady by her Advocate, after instructions from her, that she does not wish to press the application preferred in the Trial Court for amendment nor does she wish to pursue

her case as set up therein any further. Based upon this statement made on instructions from the landlady, this Court disposed of the said Writ Petition.

9. In the meanwhile, the Int.Notice No.3843 of 2002 of 7th September, 2002 was placed for hearing. The Int.Notice of 7th September, 2002 is by the respondent and it prays for the following reliefs :-

a) The Plaintiff be directed by the Order of this Hon'ble Court to remove her lock from the suit flat i.e. Flat No.11, second floor, Geetanjali Building, Lady Jamshedji Road, Mahim - 16 forthwith.

b) The Senior Inspector of Mahim Police Station and/or the

Commissioner of Police, Police Head Quarters, Mumbai, be directed to break open the lock put by the plaintiff/Landlady on flat No.11, 2nd floor, Geetanjali Building, L.J.Road, Mahim, Mumbai-16 and put the defendant/tenant Shri.Tikam Wadhwani in possession of the suit premises.

c) The plaintiffs be restrained by an order and injunction of this Honourable Court from in any way interfering with the smooth use, occupation and possession of the tenancy of Mr.Tikam Wadhwani in respect of the suit, premises viz. Flat No.11, 2nd Floor, Geetanjali Building, L.J.Road, Mahim, Mumbai - 400 016.

d) One copy of Notice be ordered to be served on the Adv. of the plff. Shri.V.R.Tripathi, 20, Anand Bhavan, T.H.Kataria Marg, Mumbai.

e) Any other or further reliefs as this Honourable Court may deem fit and proper to uphold the dignity and decorum of the Court and the prevention of the abuse of the process of the Court and for ends of justice;

f) costs of this application be provided for;"

10. The respondent-defendant states in this Int. Notice that the suit has been filed on 28th November, 2001. The returnable date of the

summons was 11th November, 2002. However, it is contended that the respondent-defendant had to leave the suit premises allegedly for a temporary period and was required to shift to Delhi on account of his daughter's illness. During this period, i.e. the stay at Delhi, it was thought that the suit premises should not be kept locked and, therefore, the friend of the respondent-defendant was allowed to occupy the same.

11. The case set up in Paras 4 to 7 of the Int.Notice is as under : -

> "4: It was not advisable to keep the suit Flat unattended and hence, I requested one of my close friend Mr.Navin Sangani to look after the suit flat by paying occasional visits. Mr.Navin Sangani allowed one of

his friend Mr.Imam Siddique to occupy the suit flat for a period of 15 days only as his own Flat was under repair and he wanted a temporary accommodation. Mr.Imam Siddique was requested by my friend Mr.Navin Sangani to get the said Flat cleaned and also painted which he did. As promised Mr.Imam Siddique left the said Flat after, about two weeks and handed over the key to the lock of my said flat to Mr.Navin Sangani. At and about the same time Mr.Imam Siddique's brother Mr.Moinuddin Siddique was just married and for the sake of privacy, he wanted to use the said Flat for a fortnight before he made his own arrangement. On being requested by both the

brothers, my friend Navin Sangani obliged the newly wedded Mr.Moinuddin Siddique to use the said flat for about two weeks.

5. When one evening Mr.Moinuddin Siddique and his wife returned to the said Flat, he found that somebody has put a second lock on my lock on the said flat. Mr.M.Siddique made inquiries and he was told to contact the owner of Midland Bar & Restaurant, who is the husband of the owner of the building. When Mr.M.Siddique contacted the owner of the Midland Bar & Restaurant who is the husband of the owner of the building, Mr.M.Siddique was threatened by him and all others with him to forthwith vacate the

said flat and remove all his belongings and also give in writing of having done so. Mr.M.Siddique was frightened by the scene created and agreed as was threateningly told. The Landlady’s lock was then removed. The said Mr.M.Siddique opened my lock with the key with him and he removed all his own personal belongings from the said Flat and gave a writing as required by the Landlady’s said representative. Mr.M.Siddique put my lock on the door and thereafter the landlady’s lock was again put on my lock by landlady’s representative Mr.M.Siddique then left the place and handed over the key to his brother Imam Siddique, who passed it on to

Mr.Navin Sangani.

6. I was not aware of all the happenings in Mumbai as I was busy with my daughter Malika who was under the border line of life and death. Mr.Navin Sangani went to America for personal work. I had also taken my daughter Malika to America as my two daughters were in America. I requested my nephew Mr.Rajiv Hingorani to go and visit the flat and get it cleaned as I wanted to come and stay with my daughter there, so that she can have a change. My nephew Mr.Rajiv Hingorani when visited the said flat, he found a second lock on my lock on the said flat and as such he could not open my said flat. He,

however, found a letter addressed to police pasted on the door of the suit flat. he could not remove the said letter, but he copied down the contents of the said Notice and sent the same to me by e-mail to Delhi.

7. Thereafter, I came to Bombay, and myself went to the suit premises and found that there is another lock of the landlady put on my lock of the suit premises. The landlady owns the Midland Bar & Restaurant on ground floor and she and her husband and their family has a great clout and influence in the locality and in the Police Station also. I am a old man of 71 years having serious Heart ailments and I have

undergone open Heart By-pass Surgery and I was afraid to approach the Landlady at her Midland Bar. I was given a reference of an Advocate by my relative in Delhi of an Advocate who is representing there in Small Causes Court. I, therefore, approached Mr.A.M.Hetavkar, Advocate and Notary, Government of Maharashtra and told him the whole story. My Advocate immediately wrote a letter dated 31.8.2002 to the Senior Inspector of Police, Mahim Police Station, Mumbai-16. The said letter was personally handed over by me at Mahim Police Station on 31.8.2002 at 6.45 p.m. But for the various reasons as apprehended by me, the Inspector

> of Mahim Police Station did not take any action, though the offence committed by the Landlady was cognizable offence."

12. It is based upon the above averments, on police complaint so also an advocate’s notice that the respondent-defendant prays that the above reliefs be granted by directing the plaintiff landlady to remove the lock and put her in possession.

13. The grievance of the respondent-defendant is that during the course of trial of this application, the plaintiff landlady by filing an affidavit in lieu of examination-in-chief tried to set up the case which was expressly given up by her by withdrawing the application for amendment. In other words, the averments and allegations in the application for amendment are sought to be

introduced by a backdoor method by filing an affidavit in lieu of examination-in-chief to oppose the prayers in the Int.Notice of the defendant-respondent. That would not be permissible, according to the respondent, as it would permit the landlady to introduce a case which has been not only given up but is inconsistent to the averments in the plaint. On the basis of these objections, an application bearing Int.Notice No.5340 of 2002 was moved by the respondent-defendant and the prayer therein is that the affidavit in lieu of examination-in-chief should not be read in evidence. That application has been allowed by the Trial Judge and the order is confirmed by the Appellate Bench in the revisional jurisdiction.

14. The landlady aggrieved by this has approached this Court by filing the present petition under Article 227 of the Constitution of India.

15. I have heard Mr.Godbole appearing for the landlady and Mr.Dani appearing for the respondent-original defendant.

16. With their able assistance, I have perused the petition and the annexures thereto.

17. When this petition was placed before this Court, on an earlier occassion, an apprehension was expressed by the counsel appearing for the petitioner that in the light of the order passed by this Court in Writ Petition No.6800 of 2003, the petitioner- landlady would never be able to plead a case of her being in possession of the premises for sometime or at least prior to the institution of the suit. That apprehension was based upon the statements recorded in the order datd 17th October, 2003 in Writ Petition No.6800 of 2003. This Court, therefore, thought that the order should be clarified by the same learned

Single Judge, who heard Writ Petition No.6800 of 2003. Accordingly, parties were given liberty to move the same learned Single Judge. An order has been passed on the application for Speaking to the Minutes/Clarification on 12th April, 2006 and it is in the following terms : -

> "Thus it is clear that in two places in the order of the Court the statement of counsel for the Respondent has been recorded to the effect that (i) the application for amendment that was moved before the Court of Small Causes was being withdrawn and (ii) the Respondent shall not rely upon the case which was sought to be made in the application for amendment. The order of the Court is therefore clear in itself.

> However, it is clarified that in response to the application for restoration of possession that has been moved by the Petitioner, if the Respondent seeks to lead evidence in support of the defence that has been made in the affidavit in reply, it would be for the learned Trial Judge to decide whether evidence should be permitted to be led on a case which has not been set up in the plaint."

18. After this clarification, the matter has been again placed before this Court.

19. In my view, proper course for removing the unnecessary confusion is to direct that the Court of Small Causes should hear and decide

R.A.E.Suit No.202/339 of 2002 and Int.Notice No.3843 of 2002 together. Since the petitioner landlady is seeking possession of the premises and at the time of filing of the suit, she was 54 years of age, it is desirable and in the interest of justice that the Trial Court endeavours and disposes the suit and Int.Notice within a period of six months from the date of receipt of the copy of the order passed by this Court in this petition.

20. Both sides do not dispute that the suit filed by the petitioner landlady is for possession on the grounds available to her in law. For the pleas in the unamended plaint to be considered there is no requirement in law for the landlady to show that she is in physical possession of the suit premises. In the light of the above, strictly speaking, it would not be necessary to issue any clarification. However, Mr.Godbole states that in case the petitioner

landlady does not succeed in proving her case in the suit and the Int.Notice moved by the respondent-defendant is required to be dealt with and decided in accordance with law, then, and in that event, only the petitioner landlady be permitted to lead her evidence and her affidavit in evidence should, according to him, contain all materials to disprove the case of the respondent-defendant. In other words, his prayer is that the order dated 4th December, 2004 on Int.Notice No.5340 of 2004 which stands confirmed by the revisional order of the Appellate Bench dated 6th October, 2005 should not constitute any impediment or bar for the landlady in raising appropriate pleas.

21. In my view, it would only be in the event, the petitioner landlady does not succeed that such an occassion will arise. If she succeeds, then, a decree for possession would naturally follow. That decree for possession

being subject to the right of the respondent-defendant to challenge the same necessarily means that nothing would survive in so far as the Int.Notice No.3843 of 2002. However, in the event, the petitioner landlady is not successful in her suit and the Int.Notice No.3843 of 2002 is required to be heard and decided, then, it is clarified that it would be open for petitioner landlady to cross examine respondent-defendant on the case set up in the above Interim Notice and lead oral evidence so also in addition raise all pleas, save and except, those forming part of the application for Amendment made in the suit. This would sufficiently protect parties inasmuch as the suit is going to proceed on the basis that the amendments are not pressed by the landlady.

22. By these clarifications, in my view, interest of justice would be sufficiently protected. In any event, that is subserved by

the direction issued to the Trial Court to expedite the hearing of the suit alongwith Int.Notice No.3843 of 2002.

23. This Writ Petition is disposed of in the light of the above clarifications. There is no order as to costs. All contentions on merits of both sides are expressly kept open.

Sd/-

(S.C.Dharmadhikari, J.)